

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

RUBEN S. ELPEDES,  
Petitioner,

v.

FERNANDO GONZALEZ, warden,  
Respondent.

No. C 09-362 MHP (pr)

**ORDER DENYING HABEAS  
PETITION**

**INTRODUCTION**

Ruben Elpedes filed this pro se action seeking a writ of habeas corpus under 28 U.S.C. § 2254. The matter is now before the court for consideration of the merits of the amended petition. For the reasons discussed below, the amended petition will be denied.

**BACKGROUND**

The crime was summarized by the California Court of Appeal:

The victim, (V.), is defendant's daughter; she was eight years old at the time of the offense. Defendant and V.'s mother separated in 1999, and defendant had visitation with V. every other weekend. V. was visiting with defendant on January 22, 2005, at a time when he lived with his friends Edwin and Bella T. and their children in their home. . . . V. testified at trial that while she was trying to sleep at the T.'s house earlier that evening, defendant pulled down her pajama pants and rubbed her vagina over her panties, causing it to bleed.

Pet. Ex. 1, California Court of Appeal Opinion ("Cal. Ct. App. Opinion"), pp. 1-4.

At a jury trial in 2006 in Alameda County Superior Court, Elpedes was convicted of committing a lewd act on a child. Cal. Penal Code § 288(a). He was sentenced to six years in prison.

Elpedes appealed. The California Court of Appeal affirmed his conviction and the

1 California Supreme Court denied his petition for review. He then filed this action.

2 Elpedes' amended petition for writ of habeas corpus alleged one claim for relief:  
3 prosecutorial misconduct. The court found the claim to be cognizable in a federal habeas  
4 action and ordered respondent to show cause why the amended petition should not be  
5 granted. Respondent filed an answer. The matter is ready for a decision on the merits.

### 6 **JURISDICTION AND VENUE**

7 This court has subject matter jurisdiction over this habeas action for relief under 28  
8 U.S.C. § 2254. 28 U.S.C. § 1331. This action is in the proper venue because the challenged  
9 conviction occurred in Alameda County, California, within this judicial district. 28 U.S.C.  
10 §§ 84, 2241(d).

### 11 **EXHAUSTION**

12 Prisoners in state custody who wish to challenge collaterally in federal habeas  
13 proceedings either the fact or length of their confinement are required first to exhaust state  
14 judicial remedies, either on direct appeal or through collateral proceedings, by presenting the  
15 highest state court available with a fair opportunity to rule on the merits of each and every  
16 claim they seek to raise in federal court. See 28 U.S.C. § 2254(b), (c). State court remedies  
17 were exhausted for the claim in this petition.

### 18 **STANDARD OF REVIEW**

19 This court may entertain a petition for writ of habeas corpus "in behalf of a person in  
20 custody pursuant to the judgment of a State court only on the ground that he is in custody in  
21 violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a).  
22 The petition may not be granted with respect to any claim that was adjudicated on the merits  
23 in state court unless the state court's adjudication of the claim: "(1) resulted in a decision that  
24 was contrary to, or involved an unreasonable application of, clearly established Federal law,  
25 as determined by the Supreme Court of the United States; or (2) resulted in a decision that  
26 was based on an unreasonable determination of the facts in light of the evidence presented in  
27 the State court proceeding." 28 U.S.C. § 2254(d).

28 "Under the 'contrary to' clause, a federal habeas court may grant the writ if the state

1 court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of  
2 law or if the state court decides a case differently than [the] Court has on a set of materially  
3 indistinguishable facts.” Williams (Terry) v. Taylor, 529 U.S. 362, 412-13 (2000).

4 “Under the ‘unreasonable application’ clause, a federal habeas court may grant the  
5 writ if the state court identifies the correct governing legal principle from [the] Court’s  
6 decisions but unreasonably applies that principle to the facts of the prisoner’s case.” Id. at  
7 413. “[A] federal habeas court may not issue the writ simply because that court concludes in  
8 its independent judgment that the relevant state-court decision applied clearly established  
9 federal law erroneously or incorrectly. Rather, that application must also be unreasonable.”  
10 Id. at 411. A federal habeas court making the "unreasonable application" inquiry should ask  
11 whether the state court's application of clearly established federal law was "objectively  
12 unreasonable." Id. at 409.

### 13 DISCUSSION

14 Elpedes contends that the prosecutor committed misconduct in his opening statement,  
15 violating Elpedes’ Fourteenth Amendment right to due process. Elpedes alleges that the  
16 prosecutor’s mention of Elpedes’ drug use and domestic violence history violated a court  
17 order. To understand his claim, one must consider an in limine proceeding in the trial court.

18 Elpedes filed a pretrial motion in limine to exclude “other crimes evidence on the  
19 grounds that such evidence is inadmissible propensity evidence and more prejudicial than  
20 probative.” RT 52. In discussing the motion, the prosecutor expressed his intent to defend  
21 the victim’s mother’s credibility by “elicit[ing] interactions that . . . [she] had with the  
22 defendant.” RT 53. Defense counsel expressed his intent to “prevent . . . the jury coming to  
23 the conclusion that [the defendant] has a propensity to commit crimes, period,” and to use the  
24 volatile parental relationship to show that “[the mother’s family] coached this child to a  
25 certain extent because of this animosity.” RT 54-56. The trial court granted the motion,  
26 stating that it was "granted to the extent that it’s not propensity evidence, but they can get  
27 into it for other reasons.” RT 57. The court also phrased its ruling as, “they can’t get into  
28 other crimes evidence for propensity. But they can allow—they can talk about arrests or

1 police contacts if it relates to something else in the dispute.” RT 55.

2 In his opening statement, the prosecutor remarked that, “[w]hen V.’s mom was with  
3 the defendant, he was abusive to her . . . [and he] also used methamphetamine on a regular  
4 basis.” RT 135. Defense counsel then moved for a mistrial, calling the prosecutor’s  
5 statement “outrageous,” and saying it had “nothing to do with this trial.” RT 136. The court  
6 denied the motion for mistrial. The court explained that, “given [that] the history of this  
7 relationship and the relationship itself has become the focus of the trial and will be the focus  
8 of the defense. . . . the relationship that’s been going on has to come out. So I will deny the  
9 motion for mistrial.” RT 146.

10 The California Court of Appeals rejected the claim that the prosecutor’s remarks  
11 disobeyed the judge’s ruling on the motion in limine and amounted to prosecutorial  
12 misconduct.

13 Since the opening remarks were at least arguably permitted by the court’s ruling,  
14 making them cannot be deemed deliberate misconduct. . . . Defendant notes that the  
15 court stated, in ruling on the mistrial motion, that it wished the prosecutor had been  
16 more specific about what he wanted to broach in the opening statement, but that  
17 remark was not tantamount to an accusation of misconduct. Further discussion of the  
18 other crimes evidence showed that, when it ruled on the mistrial motion, the court was  
entertaining the possibility that evidence of the defendant’s methamphetamine use  
might be admissible. . . . Even if the prosecutor’s opening remarks could be  
characterized as misconduct, the error was not prejudicial. . . . The jury was instructed  
three times—before opening statements, during opening statements, and before  
deliberations—that statements of counsel were not evidence.

19 Cal. Ct. App. Opinion, pp. 8-10.

20 When considering a claim of prosecutorial misconduct in federal habeas corpus, the  
21 appropriate standard of review is the narrow one of due process and not the broad exercise of  
22 supervisory power. See Darden v. Wainwright, 477 U.S. 168, 181 (1986). A defendant’s due  
23 process rights are violated when a prosecutor’s misconduct renders a trial “fundamentally  
24 unfair.” See id.; Smith v. Phillips, 455 U.S. 209, 219 (1982) (“the touchstone of due process  
25 analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the  
26 culpability of the prosecutor”). Under Darden, the first issue is whether the prosecutor’s  
27 remarks were improper; if so, the next question is whether such conduct infected the trial  
28 with unfairness. Tan v. Runnels, 413 F.3d 1101, 1112 (9th Cir. 2005).

1 If the prosecutor's remarks were not improper, the analysis ends; however, if the  
2 remarks were improper, the court looks to the circumstances at trial to determine whether  
3 such misconduct violated due process. The first factor in determining whether misconduct  
4 amounted to a violation of due process is whether the trial court issued a curative instruction.  
5 When a curative instruction is issued, a court presumes that the jury has disregarded  
6 inadmissible evidence or improper comment and that no due process violation occurred. See  
7 Greer v. Miller, 483 U.S. 756, 766 n.8 (1987); Darden, 477 U.S. at 182. This presumption  
8 may be overcome if there is an "overwhelming probability" that the jury would be unable to  
9 disregard evidence and a strong likelihood that the effect of the misconduct would be  
10 "devastating" to the defendant. See Greer, 483 U.S. at 766 n.8; see, e.g., Tan, 413 F.3d at  
11 1115-16 (finding trial fair where jury received instructions five different times to consider  
12 only the evidence presented, and not its sympathy for the victim's life story). Other factors  
13 which a court may take into account in determining whether misconduct rises to a level of  
14 due process violation include: (1) the weight of evidence of guilt, compare United States v.  
15 Young, 470 U.S. 1, 19 (1985) (finding "overwhelming" evidence of guilt) with United States  
16 v. Schuler, 813 F.2d 978, 982 (9th Cir. 1987) (in light of prior hung jury and lack of curative  
17 instruction, new trial required after prosecutor's reference to defendant's courtroom  
18 demeanor); (2) whether the misconduct was isolated or part of an ongoing pattern, see  
19 Lincoln v. Sunn, 807 F.2d 805, 809 (9th Cir. 1987); (3) whether the misconduct relates to a  
20 critical part of the case, see Giglio v. United States, 405 U.S. 150, 154 (1972) (failure to  
21 disclose information showing potential bias of witness especially significant because  
22 government's case rested on credibility of that witness); and (4) whether a prosecutor's  
23 comment misstates or manipulates the evidence, see Darden, 477 U.S. at 182.

24 Further, habeas relief for prosecutorial misconduct only would be available if the error  
25 had a "substantial and injurious effect or influence in determining the jury's verdict." Brecht  
26 v. Abrahamson, 507 U.S. 619, 637 (1993); see, e.g., Johnson v. Sublett, 63 F.3d 926, 930  
27 (9th Cir. 1995) (in light of "great mass of evidence against defendant," prosecutorial  
28 vouching "could not have had substantial impact on the verdict necessary to establish

1 reversible constitutional error" under Brecht).

2 Applying Darden, the first question is whether the prosecutor's remarks were  
3 improper. The prosecutor's opening statement remarks were not improper because the  
4 judge's in limine ruling specifically allowed the prosecutor to broach other crimes evidence  
5 to bolster the credibility of its witness and to rebut the defense theory. The defense planned  
6 to and did urge at trial that the child's accusations were the product of the mother's bitterness  
7 toward Elpedes. To show that this was not the case, the prosecution wanted to show that the  
8 mother actually and reasonably perceived Elpedes to present a danger instead of simply  
9 wanting to get even with him after an unsuccessful custody battle and relationship. The  
10 prosecutor's challenged remarks – like the mother's later testimony on Elpedes' abuse of her –  
11 were made for the permissible purpose of rebutting the defense that the child was being used  
12 to get even with Elpedes. The court declined to grant a mistrial, which indicates that the trial  
13 court recognized that its in limine ruling permitted the remark or at least was ambiguous on  
14 the point. The state appellate court also thought the in limine ruling was ambiguous, as does  
15 this court. This ambiguity makes it hard to say that the prosecutor deliberately disobeyed  
16 the order with his remarks in his opening statement.

17 Even if the remark was improper, it did not amount to a violation of due process under  
18 the circumstances. First, the court thrice instructed the jury that counsel's statements were  
19 not evidence – once before the opening statements, once immediately after the objection was  
20 made, and once before deliberations started. There is no reason to believe that the jury did  
21 not follow the instructions. Second, the evidence of guilt was reasonably strong. The child-  
22 victim's statements about the touching incident remained largely consistent from the time  
23 when she first reported the incident through the time she testified at trial. The child also  
24 exhibited to an adult (other than her mother) a physical symptom consistent with the lewd act  
25 having occurred, prompting that adult to tell Elpedes to call the child's mother. When  
26 Elpedes returned the child to her mother shortly thereafter, Elpedes said, "don't say anything  
27 stupid," which suggested there was something to conceal. Third, the prosecutor's remark  
28 about Elpedes' methamphetamine use and domestic violence history was isolated. Elpedes'

1 substance and spousal abuses were not the main theme of the prosecutor's opening statement.  
2 Although Elpedes' relationship with the victim's mother was a focus of the trial, his  
3 methamphetamine use and abuse of the victim's mother were not a significant part of the  
4 evidence proving that he had molested his daughter. Finally, the prosecutor did not misstate  
5 or manipulate the evidence referenced in his opening statement. The remarks did not result  
6 in a violation of due process.

7 Even if the statements by the prosecutor amounted to prosecutorial misconduct,  
8 Elpedes has not shown that the assumed error had a substantial and injurious effect or  
9 influence in determining the jury's verdict. The prosecutor only mentioned the drug use and  
10 domestic violence once, and the judge properly instructed the jury that counsel's statements  
11 were not to be viewed as evidence. Further, evidence of spousal abuse by Elpedes was  
12 revealed at trial because the relationship between the parents was explored as a possible  
13 reason for their child's accusation. And, as noted above, the evidence was relatively strong.

14 The state court's rejection of Elpedes' prosecutorial misconduct claim was not  
15 contrary to or an unreasonable application of clearly established federal law as set forth by  
16 the U.S. Supreme Court. The state court decision also did not result in a decision that was  
17 based on an unreasonable determination of the facts in light of the evidence presented.  
18 Elpedes is not entitled to the writ on his claim.

### 19 CONCLUSION

20 The amended petition for writ of habeas corpus is DENIED on the merits. The clerk  
21 shall close the file.

22 IT IS SO ORDERED.

23 DATED: July 28, 2010

  
Marilyn Hall Patel  
United States District Judge